

ATTACHMENT F

Calculation of Penalty per SWRCB
Water Quality Enforcement Policy

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's ("State Board") Water Quality Enforcement Policy ("Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version 5.4.1" ("Penalty Calculation Worksheet"). The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation**Step 1. Potential for Harm for Discharge Violations**

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The Discharger has failed to submit a Notice of Intent ("NOI") to comply with the Report of Waste Discharge ("RoWD") requirements or enroll in the Kern River Watershed Coalition Authority and Kings River Water Quality Coalition ("Coalitions") for discharges from irrigated cropland despite evidence that the Discharger owns such cropland. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

Using Table 3 in the Enforcement Policy, staff has determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. This conclusion is, in part, based on the size of the Discharger's irrigated land parcels, which is approximately 480 acres total.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger has undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Discharger frustrates the Central Valley Regional Water Quality Control Board's ("Central Valley Water Board" or "Board") efforts to assess potential impacts and risks to water quality, and circumvents the Board's ability to take necessary enforcement actions to address problems.

The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Discharger that are detrimental to water quality may impact a

much greater area. Moreover, the regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

The deviation from the requirement is major. To date, M.C. Land Company has undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for waste discharges and rendering that requirement ineffective. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until the discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process of becoming subject to the Order.

On 19 February 2015, the Central Valley Water Board issued a Directive Letter pursuant to California Water Code section 13260 ("Directive"), which required M.C. Land Company to obtain regulatory coverage within 15 calendar days of receipt or face a potential civil liability. The Directive was received on 27 February 2015; hence, regulatory coverage was required by 14 March 2015.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from requirement is major. Based on the above factors, a per day factor of 0.7 is appropriate. (See pg. 16 of the Enforcement Policy).

Step 4. Adjustment Factors

a) *Culpability*: 1.3

The Discharger was given the score of 1.3 for the Culpability factor. Central Valley Water Board staff sent notices on 21 February 2014 and 28 April 2014 to M.C. Land Company for their parcels in Kings and Tulare County describing the new water quality regulations and the required actions to comply therewith. Letters were also sent on 21 March 2014 and 11 July 2014 for their parcels in Kern County. M.C. Land Company also received the 13260 Directive and Notice of Violation requiring the Discharger to obtain coverage. Despite knowledge of the regulatory requirements, which is exemplified by the notices described above and the 12 March 2015 M.C. Land Company Letter, M.C. Land Company failed to come into compliance. The six notices and failure to come into compliance suggest M.C. Land Company acted intentionally in ignoring the requirement to get regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation*: 1.5

The Discharger was given the score of 1.5 for the Cleanup and Cooperation factor. The Central Valley Water Board issued the Discharger a Notice of Violation in an effort to allow the Discharger to address the violation prior to the issuance of a complaint. The Discharger did not respond and cooperate with the Central Valley Water Board despite being awarded ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate with the Central Valley Water Board after denial of the requested exemption. Cleanup is not applicable in this case.

c) *History of Violations:* 1.0

The Discharger was given the score of 1.0, as there is no evidence that M.C. Land Company has a history of violations.

Multiple Day Violations: On 19 February 2015, the Discharger was sent a Directive, which required him to obtain regulatory coverage within 15 calendar days of receiving the Directive or face a potential civil liability. The Directive was received by the Discharger on 27 February 2015. Thus, regulatory coverage was required by 14 March 2015. As of 14 May 2015, the date on which this Complaint was issued, the Discharger was 61 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy (pg. 30). Under that approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a NOI is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit a NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit a NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is

associated predominately with costs of permit fees and submitting an annual monitoring report, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days to be assessed in this case under the alternate approach is 8. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the Minimum Approach to a total number of 38 days of violation.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$51,870.* (Initial Liability (\$1,000/day x 38 days x 0.7) x Adjustments (1.3)(1.5)(1.0)).

BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is **\$51,870**. The following factors apply to the Base Liability Amount for the violation.

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, "[t]he ability of a discharger to pay an ACL is determined by its revenues and assets." (pg. 19.) The Discharger has the ability to pay the Base Liability Amount. The value of the Kern, Kings, and Tulare County properties owned by the Discharger is a significant asset. According to the Kern, Kings, and Tulare County Assessor's offices, the 2013-2014 assessed value of the parcels was listed as \$2,760,673. In 2014, the Discharger's ownership of approximately 480 acres of almonds, pistachios, and alfalfa generated an estimated \$2,720,711.18 in revenue¹. Therefore, there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

There are no factors under this category that warrant an adjustment.

¹ Information provided by the 2013 Kern, Kings and Tulare County Agricultural Crop Reports, available at http://www.kernag.com/caap/crop-reports/crop10_19/crop2013.pdf, <http://www.countyofkings.com/home/showdocument?id=6095>, and <http://agcomm.co.tulare.ca.us/default/index.cfm/standards-and-quarantine/crop-reports1/crop-reports-2011-2020/2013-crop-report-pdf/>

Step 8. Economic Benefit²

Economic Benefit: \$2,869

The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency's ("US EPA") Economic Benefit Model ("BEN")³ penalty and financial modeling program, unless it is demonstrated that an alternative method of calculating the economic benefit is more appropriate. Economic benefit was calculated using BEN version 5.4.1. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit of failing to apply management techniques that are required under a regulatory program. The benefit is calculated by identifying the regulation at issue, the associated management practices (or the appropriate compliance action), the date of noncompliance, the compliance date, and the penalty payment date.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower" under General Order R5-2013-0100 *Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-party Group* (Individual General Order), or filing an NOI for regulatory coverage under a third-party group Order and joining the Coalition. As of the date this Complaint was issued, the Discharger has not chosen to join the Coalition. The Central Valley Water Board cannot compel the Discharger to join the Coalition, but can "prescribe requirements although no discharge report has been filed." (Wat. Code, § 13263(d).) The Central Valley Water Board would prescribe such requirements by issuing a Notice of Applicability to the Discharger as an individual discharger under General Order R5-2013-0100 after holding a hearing. Economic benefit was, therefore, calculated based on the assumption that General Order R5-2013-0100 ("Individual General Order") will apply to the Discharger.

The economic benefit was calculated based on avoided costs. Avoided costs are the costs of those compliance activities the Discharger would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with obtaining regulatory coverage under the Individual General Order.

The State Water Resources Control Board charged a permit fee of \$2,692 plus \$3.40

² Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central Valley-wide. The cost estimates made in this analysis are based on the circumstances and facts related to this Discharger, rather than a broad class of Dischargers.

³ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>; the Central Valley Water Board's application of the BEN Model to the circumstances here is summarized on the last page of Attachment E.

per acre for farms 101 to 500 acres⁴ during the 2014-15 billing year. M.C. Land Company has approximately 480 acres, which results in an annual permit fee of \$4,324 for the 2014-2015 billing year. M.C. Land Company has avoided paying this permit fee for the last year. Because an annual monitoring report would be due by 1 May 2015, M.C. Land Company has also avoided costs of preparing that report which are estimated at \$960, reflecting \$120 per hour of preparation multiplied by 8 hours of preparation.

As shown in the attached summary, the estimated economic benefit associated with avoided costs is \$2,351 associated with permit fees and \$518 for annual monitoring report preparation and submittal. The total estimated economic benefit is therefore \$2,869.

Step 9. Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: \$3,156

The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited herein is \$2,869. This number plus ten percent results in a Minimum Liability of \$3,156.

b) Maximum Liability Amount: \$61,000

Discussion: As of 14 May 2015, the Discharger is 61 days late in meeting that requirement. The maximum liability under Water Code section 13261, subdivision (b)(1) for the failure to furnish a report under Water Code section 13260 is \$1,000 per each day the violation occurs, for a total of sixty one thousand dollars (\$61,000).

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a NOI to comply with the RoWD requirements under Water Code section 13260 is fifty one thousand eight hundred seventy dollars **\$51,870**.

⁴ See section 2200.6 of the 2014-15 Fee Schedules at http://www.waterboards.ca.gov/resources/fees/docs/fy1415_fee_schedule.pdf.

M.C. Land Company									
Compliance Action (Determine the actions required to comply with or prevent the violation)	One-Time Nondepreciable Expenditure		Annual Cost		Non-Compliance Date	Compliance Date	Penalty Payment Date	Benefit of Noncompliance (EPA)	
	Amount	Date ¹	Delayed? ²	Amount	Date ¹				
2014 Permit Fee ³	\$4,324	7/1/2014	n	\$0	1/1/2014	3/1/2015	7/30/2015	\$2,351	
2015 AMR preparation/submittal	\$960	9/1/2014	n	\$0	1/1/2014	5/1/2015	7/30/2015	\$518	
Totals	\$5,284							\$2,869	
Cost Index for Initiation: See Table 1 below for Index choices.									
Income Tax Schedule: For-Profit									
Source: USEPA BEN Model: Version 5.4.1									
Analyst: MMRansom									
¹ Date of the cost estimate.									
² Enter "y" if delayed, and "n" if avoided.									
³ Data Documentation available.									